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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1943.

No. 545

FRED SCHROEPFER, CHARLES R. SCHROEPFER AND ABRAHAM BERRY,

Petitioners,

VS.

THE A. S. ABELL COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT, MOTION TO PROCEED ON TYPEWRITTEN RECORD, AND BRIEF IN SUPPORT OF PETITION.

I. DUKE AVNET,
WM. TAFT FELDMAN,
Attorneys for Petitioners.

The Daily Record Co. Print, Baltimore.

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PETITION FOR WRIT OF CERTIORARI.

The petitioners, Fred Schroepfer, Charles R. Schroepfer and Abraham Berry, respectfully petition this Honorable Court for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

STATEMENT OF THE MATTER INVOLVED.

This case involves an important question of coverage under the Fair Labor Standards Act of 1938, 29 U. S. C., Sec. 201 ff., and particularly as it applies to those employees of a large metropolitan newspaper who are en-

gaged in the local distribution of its papers. Respondent is the publisher of the Baltimore Sunpapers. The facts as to respondent's interstate business briefly summarized are these: respondent receives news flashes from all over the world as well as numerous syndicated columns and other national features, advertising is solicited outside the state, raw materials used in the publication of the newspapers are derived principally from outside the state, parts of the paper (such as the Sunday rotogravure section and the magazine section) are received from without the State already printed and ready for circulation, and about 7% of its distribution is outside of the State of Maryland. Its local distribution of papers during the period involved in this proceeding was carried through three main channels: carrier delivery; sale through news stands and newspaper counters in stores, hotels, depots, etc.; and sale through "racks" or street corner receptacles in which the papers were placed and subsequently removed by the purchaser who paid for them by leaving his pennies in the attached coin box. In the latter two methods of distribution respondent made use of the so-called "rackmen" whose duties included delivering papers to the stores and to the racks. In the discharge of these duties each rackman needed a helper who was selected by the rackman and received his compensation directly from him. Respondent knew that in the service of the racks the rackmen needed and had helpers. Petitioners Fred Schroepfer and Charles R. Schroepfer were rackmen and in this proceeding they sought recovery of unpaid overtime compensation; and petitioner Abraham Berry acted as a rackman's helper to the Schroepfers and he sought recovery of both unpaid minimum wages and overtime compensation.

The District Court of the United States for the District of Maryland, sitting as a jury, decided that petitioners, Fred and Charles Schroepfer, were not employees of the respondent but were independent contractors. It also held that petitioner Berry in his work as helper was not an employee of the respondent but was the employee of the other petitioners. Finally, the District Court held that although the respondent was admittedly engaged in interstate commerce and in the production of goods for commerce within the meaning of the Fair Labor Standards Act, the petitioners were not engaged in interstate commerce.

The Circuit Court of Appeals for the Fourth Circuit affirmed the lower Court on the sole ground that the petitioners were not engaged in commerce within the meaning of the Act. The Circuit Court of Appeals made no finding on the question of whether petitioners were employees of respondent.

If, as petitioners contend, their work was in interstate commerce then the question of whether they were employees under the Fair Labor Standards Act will also have to be determined by this Court.

THIS COURT HAS JURISDICTION.

This Court has jurisdiction under Sec. 240 (a) of the Judicial Code (U. S. Code, Title 28, Sec. 347). The Circuit Court of Appeals decided this case on September 16, 1943, and its mandate issued on October 18, 1943.

THE QUESTIONS PRESENTED.

1. Were the rackmen and their helpers who distributed newspapers of the respondent to stores and racks in Baltimore City engaged in interstate com-

merce within the meaning of the Fair Labor Standards Act?

2. Were the petitioners employees of respondent within the meaning of the Act?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

In the present case the Circuit Court of Appeals decided "a federal question in a way probably in conflict with applicable decisions of this Court" (Supreme Court Rule 38 (5) (b)). Two guides to decision exist in the precedents of this Court. In *Overstreet v. North Shore Corporation*, 318 U. S. 125, the test laid down is whether the work of the employees "is so intimately related to interstate commerce 'as to be in practice and in legal contemplation a part of it' . . . and justifies regarding petitioners as 'engaged in commerce' within the meaning of the Fair Labor Standards Act". In *Walling v. Jacksonville Paper Company*, 317 U. S. 564, the test to determine whether an employee, engaged in local distribution of goods imported from without the State by a wholesaler, is within the coverage of the Act, depends upon a finding that "there is a practical continuity of movement of the goods until they reach the customers for whom they are intended." As we shall show in our supporting brief, if a realistic appraisal of respondent's business and petitioners' relation to it is made, petitioners' activity satisfies the tests set up in both the *Overstreet* and *Jacksonville* cases.

With regard to the issue of whether the employer-employee relationship existed in this case "an important question of federal law which has not been but should be settled by this court" (Supreme Court Rule 38 (5) (b)), is presented. For this question involves the proper

interpretation to be given the statutory language contained in Sec. 3(g) of the Fair Labor Standards Act "that 'employ' includes to suffer or permit to work"; and in the absence of a final ruling by this Court, the Congressional intent cannot be definitely ascertained. Moreover, if this critical language of the statute is restricted to cover only those who are employees at common law, as held in the opinion of the District Court, the benefits of the Act will be withdrawn from large groups of workmen to whom Congress undoubtedly intended such benefits to apply.

The failure of the Circuit Court of Appeals to pass upon this question should not interfere with its consideration by this Court. We believe that this Court has already shown that it regards the definition of the employer-employee relationship under social legislation of prime importance. For at this time there are pending in this Court the related cases of *National Labor Relations Board v. Hearst Publications, et al.* (Nos. 336-339, Oct. Term, 1943), involving substantially the same question under the National Labor Relations Act as is presented in this case under the Fair Labor Standards Act. It is noteworthy that the language employed in the definition of the employment relation is more restricted in the National Labor Relations Act than in the Fair Labor Standards Act, and it would seem to be at least equally important that the scope of the coverage under the latter Act, as under the former one, should be settled by this Court.

Respectfully submitted,

I. DUKE AVNET,
WM. TAFT FELDMAN,
Attorneys for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No.....

FRED SCHROEPFER, CHARLES R. SCHROEPFER, AND ABRAHAM BERRY,

Petitioners,

vs.

THE A. S. ABELL COMPANY, INC.,

Respondent.

MOTION TO PROCEED ON TYPEWRITTEN RECORD.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, Fred Schroepfer, Charles R. Schroepfer and Abraham Berry, respectfully show unto this Honorable Court:

1. That petitioners sued the respondent in the District Court of the United States for the District of Maryland for unpaid minimum wages and unpaid overtime

compensation under the Fair Labor Standards Act, Title 29, Sec. 201 ff., United States Code.

2. On December 16, 1942, the District Court of the United States for the District of Maryland rendered a judgment for the respondent dismissing the complaint.

3. On September 16, 1943, the United States Circuit Court of Appeals for the Fourth Circuit affirmed the lower Court.

4. Petitioners wish to petition this Honorable Court for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fourth Circuit, and although they are not destitute they have not sufficient funds or credit to procure the printing of the record in the case, the cost of said printing being estimated by the Clerk of this Honorable Court to be between $900.00 and $1,000.00. Petitioners Fred Schroepfer and Charles R. Schroepfer are workmen. Petitioner Abraham Berry is in the Armed Forces of the United States, serving in the United States Navy, and is unavailable to execute this petition.

WHEREFORE petitioners ask that this Honorable Court pass an order permitting petitioners to proceed upon the typewritten certified record which has been lodged in this Court by the Clerk of the Circuit Court of Appeals for the Fourth Circuit.

I. DUKE AVNET,
WM. TAFT FELDMAN,
Attorneys for Petitioners.

FREDERICK W. SCHROEPFER,
CHARLES R. SCHROEPFER,
Petitioners.

STATE OF MARYLAND, CITY OF BALTIMORE, TO WIT:

THIS IS TO CERTIFY, that on the 14th day of December, 1943, before me the subscriber, a Notary Public in and for the City of Baltimore, State of Maryland, personally appeared Fred Schroepfer and Charles R. Schroepfer, and made oath in due form of law that the matters and facts set forth in the foregoing motion are true to the best of their knowledge, information and belief.

KATHRYN M. HEALY,
Notary Public.

(Seal.)

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No. .....

FRED SCHROEPFER, CHARLES R. SCHROEPFER AND ABRAHAM BERRY,

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VS.

THE A. S. ABELL COMPANY, INC.,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINIONS BELOW.

The opinion of the United States District Court for the District of Maryland is printed in 48 F. Supp. 88, and the opinion of the United States Circuit Court of Appeals for the Fourth Circuit is reported in 138 F. (2d) 111. The opinions are also reported in full in the record (R.).

JURISDICTION.

The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code (U. S. Code, Title 28, Sec. 347). The Circuit Court of Appeals has in this case "decided a federal question in a way probably in conflict with applicable decisions of this Court" (Supreme Court Rule 38, par. (5) (b)), and the District Court "decided an important question of federal law which has not been but should be settled by this Court" and which the Circuit Court of Appeals has left open (Supreme Court Rule 38, par. (5) (b)). Judgment was entered in this case by the United States Circuit Court of Appeals on September 16, 1943 (R.).

STATEMENT OF THE CASE.

There are no controverted issues of fact in this case relative to the question of interstate commerce, and the facts are summarized above in the petition. There is divergence in the testimony on the issue of employer-employee relationship, but the facts supported by the great weight of evidence are as follows:

A. The Rackman's Duties.

The rackmen, or substitutes on occasion, were required to report at 3:30 each morning to receive papers for distribution. The company determined the number of papers each rackman received and each rackman had a definite territory, and he was required to solicit all the stores and service all the racks in his territory. The rackmen were also required to place advertising on the racks to facilitate sales, including special ads to promote carrier sales, the furtherance of which, as will be seen, diminished the rackmen's earnings (Tr. 42, 64, 77, 203, 204).

At 7:45 A. M. the racks were rechecked; at 9:15 A. M. the rackmen reported back to the office to turn in cash, to make up store sheets (showing the name and address of each store and the amount of each edition received by the store), and sometimes to attend rackmen meetings called by the company. At 10:15 A. M. the rackmen started to distribute the first edition of the evening paper. They brought their returns in about 12:30 P. M., ate lunch, and then from 2 P. M. to about 7 P. M. were kept continually busy with the several evening editions. On Sundays from 8 to 11 A. M. rackmen distributed only to stores and not to racks. On Mondays they made collections of cash and unsold papers; if their returns were not in by 10 A. M. Monday no credit was given (Tr. 47, 70, 71).

If the rackmen were unable to keep up this schedule of 72 hours or more per week, they were permitted to send a substitute on occasion. However, they could not assign or sell the route to anyone else, and they could not carry the papers of any other company (Tr. 114, 86, 316).

B. The Rackman's Earnings.

The rackmen's two principal sources of income were the weekly "salary" or "car allowance" and the difference between the amounts they were charged for papers and the sum they received from the sales through the racks. When the rackman system was instituted, the racks were "open" and losses through nonpayment were very great. The rackman was then paid a salary of $18 a week with a "car allowance" of $15, or $33 in all in addition to whatever he might earn through the racks. He was, however, required to furnish his own car and pay expenses on it. Shortly thereafter, a "closed" rack was

adopted and the rackman's salary was reduced to $25 because his losses from theft were reduced. Officials of respondent testified that they had viewed the $25 as "car allowance," although until May 1941 they had "inadvertently" used the term "salary" when paying the rackmen. When the rackman's car broke down, the company furnished a car, and the "salary" or "allowance" was reduced in that the company charged 70 cents per trip. An additional $3 "car allowance" was paid for the work connected with the Sunday papers (Tr. 25, 39, 162, 97, 70, 387).

Like other employees, the rackmen received a bonus when they left the company's service on the abandonment of the rack system by respondent. The bonus given the rackmen was $112, which was "four weeks' salary" ($4 \times \$25 + 4 \times \$3$) as the respondent's assistant business manager put it (Tr. 125), or four weeks' "car allowance" as respondents have termed it in this litigation. The balance of the rackman's earnings was derived from the difference between the amount he was charged for the papers placed in the racks and the amount received from their sale (Tr. 28, 42-43). He was allowed a credit on the papers he returned from the racks (Tr. 183) and thus made about one cent per paper (Tr. 28). This was not true of the Sunday papers on which he earned nothing since there was no rack distribution and the charge to the stores was the same as that to the rackmen (Tr. 366). Some of the rackmen who had been engaged for a longer period received "increases" in "car allowance" (Tr. 389).

In addition to car expenses, the rackman paid his helper and also paid sums varying from $2 to $7 a week for "rack rental" (Tr. 62). He also paid insurance on

the car, although for some time each insurance policy carried the name of the respondent as insured, as well as that of the rackman. Respondent's witnesses testified that insurance coverage was required of the rackmen to protect the company from damage suits occasioned by the rackmen's auto accidents (Tr. 192, 229). The rackmen paid the insurance premiums to one of the respondent's officials who in turn paid the insurer. Respondent's officials testified that this was done merely as a convenience to the rackmen (Tr. 233, 343). The rackmen also had to stand the loss from stolen or damaged papers, and had to keep the racks clean and make minor repairs (Tr. 63).

Petitioners' evidence as to their hours of work was not contradicted; respondent does not assert that it met the standards of the Act.

C. Control Over the Rackman.

As indicated above, the rackmen were required to report at the respondent's office at an hour specified by respondent, where they punched a time clock (Tr. 46) and then received the number of papers specified by respondent (Tr. 265) (occasionally exercising a limited degree of discretion in this respect) (Tr. 260) for distribution to the places designated by respondent (Tr. 76-77). In addition, they were required to place advertising placards on the racks. Sometimes these placards advertised the carrier service, which was a cheaper way of obtaining the paper than through the racks (Tr. 63-69). Other placards advertised special features, such as foreign correspondents' dispatches or World Series baseball coverage (Tr. 72-73). In 1941 the company, over the protest of the men, made the rackmen serve an additional edition to the racks without additional

compensation (Tr. 353-4). The rackmen occasionally protested the conditions of their work, particularly with respect to the Sunday duties for which they received only a "car allowance" (Tr. 81), and with respect to the placard advertising carrier service (Tr. 303, 354). However, the rackmen testified that they were threatened with discharge if they failed in those duties. At least one rackman was discharged for failure to keep placards on the racks (Tr. 67) and others were threatened with dismissal and discipline for various other "offenses" (Tr. 69, 80). "If a man began returning too many papers in his returns . . . he was told in plain English to take a little interest in his route, or get out" (Tr. 29). Full credit was not allowed on returns if—in the judgment of respondent's circulation manager—they were too heavy (Tr. 75, 243).

Supervisory officials occasionally followed the rackmen to check whether they were properly servicing the racks (Tr. 103). They were also checked as against their sales of the previous week and corresponding week in the previous year, and were under pressure to keep their sales up to these levels (Tr. 352). Meetings of the rackmen were called by the respondent (Tr. 47, 313). Respondent fixed the price of the papers in the stores and racks (Tr. 95); the rackmen had no control over that and none over the "wholesale price" charged them. Respondent owned the racks and fixed their location and number.

In June 1941 the rackmen joined the American Newspaper Guild (an affiliate of the C. I. O.) and were thereafter asked to sign individual contracts with the respondent (Tr. 32). This they refused to do because of a union rule against individual bargaining (Tr. 88-90). The

respondent refused to treat them as employees, insisting that they were "independent contractors," although in a book written by leading officers of respondent in 1937, the petitioners rackmen were listed as employees (Tr. 93).

D. The Rackman's Helper.

Petitioner Berry, in addition to being employed one night a week by respondent in loading and stuffing papers (Tr. 141), was also engaged as a rackman's helper, with working hours similar to those of the rackmen (Tr. 139). He received his remuneration directly from the rackmen with whom he worked, but respondent was aware that the rackmen had to have helpers to assist them "as it would be impossible to make deliveries by yourself and get along the territory in time" (Tr. 34-5).

ERRORS RELIED UPON.

1. The Circuit Court of Appeals erred in holding that petitioners were not engaged in commerce within the meaning of the Fair Labor Standards Act. The movement of intelligence or information across state lines is interstate commerce, and has been frequently so held in decisions of this Court. Petitioners' work was an integral part of the interstate gathering and distribution of news in which respondent is engaged, for the process which begins with the collection of news, admittedly an interstate activity, is continuous and does not end until the paper is placed in the hands of the customer or reader. The Circuit Court of Appeals attempts to overcome the force of this argument by making a distinction between "news" and "newspapers", and although it concedes that if the petitioners distributed news as such locally, they would be engaged in commerce, it distin-

guishes the present case because the news is put in written form and printed on paper stock before it is distributed by petitioners. The illusory character of this alleged distinction is revealed by the Court's own admission that "it is news, of course, that makes the papers valuable", i. e., an article of commerce.

2. The Circuit Court of Appeals likewise erred in holding that news reports, paper stock, etc., are raw materials for an entirely new product, a newspaper, created in the publishing office of the company, in the same sense as a sausage (to use the Court's example) is made of various meat products, seasoning and other ingredients. The greater number of items in a metropolitan newspaper, such as news dispatches and feature articles, and many of the advertisements, appear in the final product unchanged, just as they are received by the publisher, and they are distributed to the consumer in the identical form they possessed before crossing state boundaries; and in no manner can a new product be said to be created in the compiling of a newspaper in the sense that an automobile, or even a sausage, is a product different from the component ingredients. Indeed, certain items, such as the Sunday rotogravure and magazine sections are printed in their entirety outside of the state and are distributed locally (in combination with the rest of the paper) without even an alteration in the spatial arrangement of the items.

3. The District Court erred in holding that the petitioners were not employees of the respondent; and the Circuit Court of Appeals, by failing to make a finding on this issue, permitted to stand a decision which unduly limits the scope of the Fair Labor Standards Act, and is an open invitation to evasion of its provisions.

ARGUMENT.

I.

Petitioners Were Engaged In Commerce Within the Meaning of the Act.

Respondent concedes that it is engaged in interstate commerce within the meaning of the Fair Labor Standards Act, but denies that petitioners are so engaged because they were employed solely in the local distribution of newspapers from the respondent's establishment to local dealers and to the news racks. However, it is not necessary that an employee actually work across state boundaries for his employment to be "in commerce."

In *Overstreet v. North Shore Corp.*, 318 U. S. 125, this Court held that employees maintaining or operating a toll road and a drawbridge over a navigable waterway, which together constitute a medium for the interstate movement of goods and persons, are "engaged in commerce" within the meaning of Sections 6 and 7 of the Act. One of the employees operated the drawbridge, the second did maintenance and repair work, and the third sold and collected toll tickets. The Court held all three employees protected by the Act, saying:

> "The operational and maintenance activities of petitioners are vital to the proper functioning of the structures as instrumentalities of interstate commerce. The services of Overstreet are necessary to prevent the drawbridge from being either a barrier to interstate navigation or else a gap in the vehicular way. Without the services of Brazle the facilities would fall into disrepair, and both operation and maintenance would seem to depend upon Garvan's collecting the toll from users of the structure. The work of each petitioner in providing a means

of interstate transportation and communication is so intimately related to interstate commerce 'as to be in practice and in legal contemplation a part of it' . . . and justifies regarding petitioners as 'engaged in commerce' within the meaning of the Fair Labor Standards Act.

". . . We see no persuasive reason why the scope of employed or engaged 'in commerce' laid down in the *Pedersen* and related cases, cited above, should not be applied to the similar language in the Fair Labor Standards Act, especially when Congress in adopting the phrase 'engaged in commerce' had those Federal Employers' Liability Act cases brought to its attention." pp. 131-32.

"Petitioners, who are engaged in operating and maintaining respondent's facilities so that there may be interstate passage of persons and goods over them, are so closely related to that interstate movement as a practical matter that we think they must be regarded, under the allegations of their complaint, as 'engaged in commerce' within the meaning of Secs. 6 and 7 of the Act." p. 132.

And in *Pedersen v. J. F. Fitzgerald Co.*, 318 U. S. 740, this Court held in a *per curiam* opinion that employees of an independent contractor constructing new abutments and repairing superstructures to bridges used by an interstate railroad, were engaged in commerce and were entitled to maintain an action under the Fair Labor Standards Act.

Respondent's business must be conceived in large as the gathering and editing of news, soliciting of advertising, assembling and printing, and distributing. It is the sum of these activities that constitutes the interstate business of respondent. Petitioners' work of distribution was a link in the transmission of the news from

world-wide sources to the ultimate reader. It is unquestionably true that if the distribution of the paper were suddenly stopped, the very life of respondent's business would be jeopardized, and this would mean the virtual destruction of the news-gathering, advertising-soliciting, supplying of raw materials, and all the other operations of respondent transcending state boundaries. It is clear, therefore, that petitioners' work is "in commerce" within the broad definition laid down by this Court.

That the commerce in the present case is largely unidirectional is of no significance. Moreover, if commerce exists and the employment of a particular employee plays an important role in the traffic, he is engaged in commerce even though his own work does not transcend state boundaries. Distribution of the completed newspaper, being the ultimate step in the publishing process, is an activity in interstate commerce.

If the distribution of the papers is seen in its true perspective as the final step in the unitary news-gathering-assembling-editing-and-distributing process, petitioners' activity cannot be sheared off from the work of the rest of respondent's employees and considered purely local in character. To sever this stage arbitrarily from what precedes it would be to disregard entirely the primary function of a modern newspaper, which is to bring news from the "four corners" of the earth to the reader.

In *Hearst Publications, et al., v. National Labor Relations Board*, 136 F. (2d) 608, 610 (9 C. C. A., 1943, certiorari granted, — U. S. —), the Circuit Court of Appeals for the Ninth Circuit held that the work of newsboys doing work not dissimilar to that of petitioners, not only *affected* commerce but was *in* commerce:

> "It seems clear that the very considerable factor of street sales in connection with the interstate business being carried on by each of the newspapers concerned herein cannot be separated from other phases of such business so as to distinguish this factor as intrastate business and some other factor as interstate business."

In our view, the interstate commerce in news of respondent is closely analogous to the interstate activity of a carrier of goods; and just as the workers in the *Overstreet* and *Pedersen* cases were held to be engaged in commerce, so the work of distribution by petitioners is an essential activity in respondent's interstate commerce in news.

Petitioners are also engaged in interstate commerce because their activity is part of the continuous interstate movement of news from the point of its inception to the point at which it becomes available to the reading public, that being "the point where the parties originally intended that the movement should finally end." (*Western Union Telegraph Co. v. Foster*, 247 U. S. 105.)

It is established by decisions of this Court that the movement of intelligence or information across state lines is interstate commerce. *Associated Press v. National Labor Relations Board*, 301 U. S. 103; *Western Union Telegraph Company v. Foster*, 247 U. S. 105; *International Textbook Company v. Pigg*, 217 U. S. 91; *Pensacola Telegraph Company v. Western Union Telegraph Company*, 96 U. S. 19. And this Court squarely held in *Western Union Telegraph Company v. Foster, supra*, that the interstate commerce continues until the destination of the news is reached, notwithstanding the fact that there is a wholly intrastate distribution after a

change in the form of transmission. In that case the New York Stock Exchange furnished to Western Union quotations of prices in transactions upon the Exchange. Western Union transmitted this information in code form from New York to its station in Boston, where it was translated from Morse Code into English, and thence transmitted by an operator to tickers in the offices of the various brokers who subscribed for the service. The State of Massachusetts through its public service commission sought to regulate the transmission from Western Union's Boston office to the Boston brokerage offices. The question presented was whether the local transmission of the stock exchange prices from the station in Boston, to the brokerage offices located in the same city, was interstate commerce. Speaking for a unanimous court, Mr. Justice Holmes said (p. 113):

> "Neither the intervention of an operator, or of another company, are in the least degree conclusive. Unlike the case of breaking bulk for subsequently determined retail sales, in these the ultimate recipients are determined before the message starts and have been accepted as the contemplated recipients by the Exchange. It does not matter if they have no contract with the Exchange, directly. . . . It is enough that in our opinion transmission of the quotations did not lose its character of interstate commerce until it was completed in the brokers' offices and that the interference with it was of a kind not permitted to the States. . . . If the normal contemplated and followed course is a transmission as continuous and rapid as science can make it from exchange to brokers' office it does not matter what are the stages or how little they are secured by covenant or bond.
>
> "Practice, intent, and the typical course, not title or niceties of form, were recognized as determining

> its character (of interstate commerce). . . . It is admitted that the transmission from New York to Massachusetts by the Telegraph Company was interstate commerce. If so it continued until it reached 'the point where the parties originally intended that the movement should finally end.' "

The decision in the *Western Union* case, upon facts closely resembling those in the instant case, establishes that interstate commerce did not stop at respondent's newspaper plant. The applicability of the decision to the case at bar is demonstrated by this Court's recent announcement of similar principles in *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, which arose under the Fair Labor Standards Act. In the *Jacksonville* case, this Court held that goods shipped from outside the State remain in interstate commerce until they reached their final destination and do not necessarily terminate their journey upon their first pause within the State of destination (p. 568):

> ". . . The entry of goods into the warehouse interrupts but does not necessarily terminate their interstate journey. A temporary pause in their transit does not mean that they are no longer 'in commerce' within the meaning of the Act. As in the case of an agency . . . *if the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain 'in commerce' until they reach those points.* Then there is a practical continuity of movement of the goods until they reach the customers for whom they are intended." (Italics supplied.)

In the *Jacksonville* case, which dealt with a wholesaler's warehouse, the Court held that interstate com-

merce continued beyond the warehouse to the final destinations of the goods. Where the distribution within the state was made pursuant to prior orders, pre-existing contracts or understandings with the customers, or in anticipation of the needs of specific customers, the interstate journey did not end until the goods were delivered to the customers. In this connection, the Court stated (p. 569):

> ". . . The fact that respondent may treat the goods as stock in trade or the circumstance that title to the goods passes to respondent on the intermediate delivery does not mean that the interstate journey ends at the warehouse. The contract or understanding pursuant to which goods are ordered, like a special order, indicates where it was intended that the interstate movement should terminate."

Translated into terms of the case at bar, the test set forth in the *Jacksonville* case is, did the intelligence or information which was wired across State lines into respondent's newspaper office and there transferred with all possible speed to the racks and stores enjoy a practical continuity in transit or was it acquired and held at the editorial office of The Baltimore Sun as goods are held by a local merchant for local disposition? And the answer to this question should be made in the light of this Court's admonition that "Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." *Swift & Co. v. United States*, 196 U. S. 375, 398, quoted with respect to this Act in *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 570.

In the *Jacksonville* case the Court stated that if extra-state goods had a specific local destination, the goods enjoyed a *practical* continuity in transit so as to render

their distribution from a local warehouse an activity in interstate commerce. In the instant case, the matter of handling the news demonstrates that there was *actual* continuity in transit; the transmission was "as continuous and rapid as science can make it." (*Western Union Telegraph Co. v. Foster*, 247 U. S. at 113.) But the facts of this case also indicate that there was a "practical continuity" in the sense that that phrase was used in the *Jacksonville* case. The intelligence or information when it began its interstate journey was not destined to stop at the newspaper plant, but instead was intended to move immediately to the racks, and to the stores and other places which had standing orders or their equivalent with respondent.

Nor is it significant that the intelligence here was altered in form or appearance at the plant. *Western Union Telegraph Co. v. Foster, supra.* In *Southern Pac. Terminal Co. v. Interstate Commerce Comm.*, 219 U. S. 498, the Court indicated that processing operations did not interrupt the flow of commerce if the goods were intended for specific destinations so as to enjoy what in *Jacksonville* is termed a "practical continuity of movement". In the *Southern Pacific* case, cottonseed cake was brought from without the State and shipped to Galveston, Texas, where it was processed into meal and then shipped to foreign ports which had previously ordered it. In answer to the contention that the interstate commerce ended in Galveston where the cake was processed into meal, the Court said (p. 526):

> ". . . the manufacture or concentration on the wharves of the terminal company are but incidents . . . in the transshipment of the products in export trade."

In *Caldwell v. North Carolina*, 187 U. S. 622, a Chicago company shipped to itself at Greensboro, N. C., pictures and frames in separate boxes. When they reached Greensboro, Caldwell, the company's agent, received the boxes from the railroad at its depot, carried them to his room, opened the boxes, took out the pictures and picture frames, assorted them and put them together, and delivered them to the purchasers in Greensboro. This Court held that the whole transaction was interstate until the actual delivery to the purchaser.

The intelligence or information which forms a subject of commerce enjoyed both an actual continuity of movement through respondent's plant to the newsstands and racks, and also a "practical continuity" of movement in that it was intended for immediate transmission to the stores (which had standing orders) and to the racks controlled by respondent. Petitioners were fully as much a part of that movement as were employees receiving news off the wires. Petitioners were therefore engaged in commerce within the meaning of the Act.

II.

1. Petitioners, Fred and Charles Schroepfer, Were Employees Of Respondent.

The Fair Labor Standards Act gives the broadest possible definition of the employer-employee relationship. Sec. 3 of the Act reads in part: "(e) 'Employee' includes any individual employed by an employer; (g) 'Employ' includes to suffer or permit to work".

In view of the facts which we have detailed at some length, it is evident that the rackmen were employees of respondent and not independent contractors. In summary it appears that the rackmen were limited in the

route where their work was done and the respondent reserved the right to, and did on occasion, take away busy racks from their routes and gave the "points" to newsboys; the rackmen were permitted to distribute respondent's papers only and were not allowed to assign or sell their routes; the sales price of the papers was fixed by the respondent; their hours of work were determined by the respondent in regulating the time of its various editions, as the men were expected to be on hand when the papers came off the presses and they had to punch a time clock when reporting in the morning; the number of papers allotted to the men were in the control of the respondent; their returns were limited by the Circulation Department; they were supervised in the manner of servicing the racks and were required to attend meetings at which they were asked by the Circulation Manager what "they were doing and thinking about" and were given "pep talks" on the value of advertising; they were compelled to put up advertising cards in the racks, even those promoting carrier service to their own detriment; they were required at their expense to insure respondent against liability due to the negligent operation of their automobile; they were compelled to make minor repairs to racks; they were threatened with discharge for breaches of discipline; they had to distribute Sunday papers for a fixed compensation estimated to cover little more than the cost of operation of their automobiles; they were required to solicit all stores in their routes, although it was uncontradicted that the compensation allowed for such "sales" was inadequate; in 1941 additional editions were put out and the men were required to make additional trips without extra compensation; the respondent exercised further control over the earnings of the men by varying the rack

rental in its arbitrary discretion. And if respondent's own testimony is to be accepted, the amount allowed the men for car expense was also fixed by respondent. Furthermore, the respondent, through certain of its high-ranking officials described the petitioners as employees in a book written by them under the title "The Sunpapers of Baltimore".

A practical approach to the problem presented here is illustrated in *Singer Mfg. Co. v. Rahn*, 132 U. S. 518; in Chief Judge (later Mr. Justice) Cardozo's opinion in *Glielmi v. Netherland Dairy Co.*, 254 N. Y. 60, 171 N. E. 906; and in the opinion of Judge Learned Hand in *Lehigh Valley Coal Co. v. Yensavage*, 218 Fed. 547, 552-553 (C. C. A. 2), certiorari denied, 235 U. S. 705. The standards set forth in these cases support the view that both the rackmen and the helper here are respondent's employees. Formal or technical concepts must yield to the actual conditions of the relation. Where the worker "is bound hand and foot as long as he works the route at all, his freedom an illusion, and his independence but a name" (*Glielmi* case, 171 N. E. at 907), no formal agreement, however "adroitly framed to suggest a different relation" (ibid.) can repudiate the responsibilities of the employment relationship.

Moreover, we are concerned here not with the existence or nonexistence of a common law employer-employee relationship, but rather with the practical application of a statutory definition in the light of the purposes of the statute. This Court recently noted that the term "employee" is not a "word of art" but one which "takes color from its surroundings and frequently is carefully defined by the statute where it appears." *United States v. American Trucking Assns.*, 310 U. S.

534, 545. It is our position that the definitions set forth in the Act expand the concept of the employment relation beyond that embraced in the common-law concept of master and servant. "The Act is a remedial one and must be liberally construed . . ." The definition of " 'employ' . . . is very broad . . ." *Fleming v. Palmer*, 123 F. (2d) 749, 762 (C. C. A. 1), certiorari denied, 316 U. S. 662.

> "We are dealing here not with private rights . . . nor with technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants but with a clear legislative policy . . . *International A. of M. v. National Labor Relations Board*, 311 U. S. 72, 80.

The words of the statute "must be understood with reference to the purpose of the Act, and where all the conditions of the relation require protection, protection ought to be given." *Lehigh Valley Coal Co. v. Yensavage*, 218 Fed. 547, 552-553 (C. C. A. 2), certiorari denied, 235 U. S. 705. Since, as has been demonstrated above, the petitioners were employees of respondent under the principles of common law, it follows that they were employees within the broader concept adopted in the definition of the Act.

Section 3, the definitional clause of the Act, provides in subsection (e) that " 'employee' includes any individual employed by an employer" and in subsection (g) that " 'employ' includes to suffer or permit to work." When Congress adopted this definition—which Senator (now Mr. Justice) Black called "the broadest definition that has ever been included in any one act" (81 Cong. Rec. 7657)—it selected terms to which previous judicial decisions had given broad scope. *Curtis & Cartside Co.*

v. Pigg, 39 Okla, 31, 134 Pac. 1125 (1913); *Purtell v. Philadelphia & Reading Coal & Iron Co.*, 256 Ill. 110, 99 N. E. 899 (1912); *People ex rel, Price v. Sheffield Farms-Slawson-Decker Co.*, 225 N. Y. 25, 121 N. E. 474 (1918); *Chattanooga Implement & Mfg. Co. v. Harland*, 146 Tenn. 85, 239 S. W. 421 (1922); *Commonwealth v. Hong*, 261 Mass. 226, 158 N. E. 759 (1927); *Buffalo Steel Co. v. Aetna Life Ins. Co.*, 136 N. Y. Supp. 977, 983 (1915); *Grcham v. Goodwin*, 170 Miss. 896, 156 So. 513, 514 (1934).

The identical language used in the Act to define "employ" has been minutely analyzed and interpreted in numerous decisions. The opinion of the court in the case of *Curtis & Gartside Co. v. Pigg*, 39 Okla. 31, 134 Pac. 1125 (1913), contains a particularly convincing delineation of the term "suffer or permit". That case involved a statute making it illegal for children to be "employed, permitted, or suffered," to work in certain operations. The court, pointing out that the words "permit" and "suffer" go farther than the word "employ", said (p. 1129):

> "The inhibition is just as strong and positive against permitting or even suffering a child of this age to do such things as it is against employing him to do them. . . . If the statute went no farther than to prohibit employment, then it could be easily evaded by the claim that . . . he was not employed to do such work, nor was permission given him to do so. But the statute goes farther, and makes use of a term even stronger than the term "permitted". It says that he shall be neither employed, permitted, nor *suffered* to engage in certain works. The relative significance of the words, "permit", "allow", "suffer" is illustrated by Webster under the word "permit", as follows: "To *permit* is more positive, denoting a decided assent, either directly or by im-

> plication. To *allow* is more negative, and imports only acquiescence or abstinence from prevention. To *suffer* is used in cases where our feelings are adverse but we do not think best to resist. . . . Hence, by giving the language of the statute the ordinary meaning and significance which it bears in common usage, it is clear that additional restraints to that of mere employment are placed upon the employer. It means that he shall not *employ* by contract, nor shall he *permit* by acquiescence, nor *suffer* by a failure to hinder. (Italics the Court's).

In *Southern Ry. Co. v. Black*, 127 F. (2d) 280, 281-282, it was held by the Fourth Circuit Court of Appeals that porters in a railroad station were "employees" within the meaning of this Act:

> "The determinative factor is not the source of their compensation, but the fact that they render services which are necessary to the proper running of defendant's station, that they are hired or selected by defendants, and permitted by them to render these services, that they are subject to the general supervision and control of defendants in rendering the services and that the defendants have the power to discharge them".

To the same effect see *Williams v. Jacksonville Terminal Co.*, 315 U. S. 386, at 397-398, in which the company finally conceded that the "red caps" were its employees.

We know of no other cases under the Fair Labor Standards Act involving employees engaged in the distribution of newspapers. However, the decisions under other statutes show that the rackmen should be considered employees under the broad definitions of this Act. First, we refer to certain decisions under the Wagner Act.

In the *Seattle Post-Intelligencer, IX N. L. R. B.*, 1262, 1272-1275, the work was quite similar to that performed in the present case, and the method of compensation was also similar. Moreover, there was an actual "dealer's contract" between the company and the drivers under which the drivers purported to purchase the company's newspapers. The Labor Board held the drivers to be employees in language highly appropriate to the present case:

> "We entertain no doubt that motor route drivers are employees within the legislative intent. Their position is relatively that of employees, generally. The work they perform is a functional part of the business of the newspaper, subject in large measure to the control and right of control of the Company as to manner and mode of execution. Performance concerns not so much the accomplishment of any specified result as continuing operation in close association with the entire enterprise of the Company. The drivers have no real interest in the business and good will represented by the subscription lists; the business and good will are in fact the property of the Company available at any time to its exclusive enjoyment by termination of drivers' contracts. The drivers cannot act as employees or representatives of any competing publisher without the Company's assent but must devote their effort to securing new subscribers for the Company's newspapers. We do not consider the method by which the drivers are compensated as inconsistent with their employee status. In addition to the weekly allowance for car expense and carriage of bundles they receive the difference between the so-called purchase price and the regular subscription price. Inasmuch as the drivers deal only with newspapers delivered to subscribers their return is analogous to earnings measured by the number of subscription deliveries rather than profit from an independent business." p. 1275.

In *Hearst Publications et al. v. National Labor Relations Board*, 136 F. (2d) 608, 610 (certiorari granted, ... U. S. ...), the majority of the Circuit Court of Appeals, in holding that so-called "newsboys" were not employees, relied chiefly on two features of the relationship, both of which do not exist in our case. The Court adverted to the fact that the "newsboys" could sell papers for more than one publisher. It also made much of the fact that the newsboys could buy and sell corners without the approval of the publisher. In the present case, it was stipulated that the rackmen were permitted to deliver respondent's papers only; and petitioners' testimony was uncontradicted that their routes were not assignable. Nevertheless, we feel that this Court will hold the petitioners in the *Hearst Publications* case to be employees, and if under the circumstances of that case, involving a more restricted statute, the workmen are to be considered employees, then *a fortiori* must the petitioners be held to be employees.

Second, we refer the Court to certain decisions under the Unemployment Insurance Laws of the states. In two New York cases, under quite similar fact situations, men engaged in the delivery of newspapers were held to be employees and not independent contractors as contended by the companies. *In re LeValley*, 27 N. Y. S. (2d) 338 (1941); *In re Scatola*, 14 N. Y. S. (2d) 55 (1939), aff'd. 26 N. E. (2d) 815. The same result was reached by the Court of Appeals of Utah under closely related facts. *Salt Lake Tribune Pub. Co. v. Ind. Comm. et al.*, 102 P. (2d) 307 (1940).

Third, the same decision has been announced in tort actions involving distributors of newspapers. *Dispatch Pub. Co. v. Schwenk et al.*, 34 N. E. (2d) 150 (Ind. 1941);

Hampton v. Macon News Printing Co., 12 S. E. (2d) 425 (Ga. 1940).

In the present case, even the District Court felt constrained to point out, apologetically, that "from the standpoint of economic position they would probably be called employees" and that "it may seem grandiose to call the plaintiffs independent contractors". Bearing in mind that "Congress in passing the Act was dealing with economic realities", *Fleming v. Palmer*, 123 F. (2d) 749, 762 (C. C. A. 1), certiorari denied, 316 U. S. 322, the very findings of the District Court suffice to establish that petitioners were employees of respondent within the meaning of Sections 3(d), (e), and (g) of the Act.

2. Petitioner Berry, As Helper of the Schroepfers, Was An Employee of Respondent.

We have already shown that the rackmen required the services of a helper in the performance of their duties of distribution of respondent's papers. We have likewise seen that respondent knew that these helpers were used and that it acquiesced in the practice. Under these circumstances, the helpers must be considered as the employees of respondent.

In *Southern Railway Co. v. Black*, 127 F. (2d) 280, the Railway Company merely selected the head "red caps", who in turn hired the other "red caps". Yet they were all properly held to be employees of the company. Similar considerations apply to the helpers in the present case.

In *Cottrell v. Wetterau Grocer Co., Inc.*, 4 Wage Hour Rept. 482 (U. S. D. C. E. D. Mo. 1941) it was held that a truck driver's helper, employed by the driver with the knowledge of the employer, is an employee of the em-

ployer within the meaning of the Fair Labor Standards Act.

Similar results have been reached by the Courts in construing other statutes of a social nature. Thus in *Hockmith v. Perkins*, 191 S. E. 156 (Ga., 1937), a boy 14 years old, was hired by one of Hockmith's drivers to assist in loading the truck and in making deliveries, and was to be paid by the driver. The employer knew of the arrangement. The Georgia Court held that for the purpose of the Workmen's Compensation Act, Perkins was an employee of Hockmith, for where an employee employs a helper with the knowledge of the employer, the helper is an employee of the employer. The same conclusion was reached in the later Georgia case of *American Mutual Liability Insurance Company v. Harris*, 6 S. E. (2d) 168 (1939), in which a truck driver's helper was injured during the course of the employment. Other cases under Workmen's Compensation laws to the same effect are *Williams v. American Employers' Insurance Co.*, 107 F. (2d) 953 (D. C. App. 1939) and *Michaux v. Gate City Orange Crush Bottling Co.*, 172 S. E. 406 (N. C.)

The same statutory language was involved in *Chattanooga Implement & Mfg. Co. v. Harland*, 239 S. W. 421 (Tenn. 1922), where an operator of a mill was sued for injuries sustained by a minor under a statute making it unlawful "to employ, permit or suffer" any child less than 14 years of age to work in any mill, factory, or workshop. The defendant had never entered into an employment relationship with the minor in the usual sense, but certain of defendant's regular employees had permitted the boy to help them and had paid him out of their own piece-rate wages. The court held defendant liable. "Suffer or permit to work", it concluded, may

not be limited to those situations in which an employer exercises direct supervision and control.

It would certainly be against the policy of the law to permit an employer, such as respondent, to set up an operation in the distribution of its product which it well knows cannot be handled by one man, and absolve itself from responsibility for the payment of substandard wages when that employee employs an assistant to help him in carrying out the instructions of the employer. The Fair Labor Standards Act would afford illusory protection to workers if it could be evaded by such a device. It is true that respondent maintained this arrangement for many years before the passage of the Act, but although the system was not a mere contrivance to avoid the operation of the Act, no vested rights were created thereby and respondent cannot be absolved from responsibility for paying to the helpers the minimum compensation required by the Act.

CONCLUSION.

It is respectfully submitted that this case is one calling for the exercise by this Court of its review jurisdiction under Sec. 240 (a) of the Judicial Code; and that to such an end a writ of certiorari should issue to the U. S. Circuit Court of Appeals for the Fourth Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 545.

FRED SCHROEPFER, CHARLES R. SCHROEPFER, AND ABRAHAM BERRY,
Petitioners,

vs.

THE A. S. ABELL COMPANY, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

EDWIN F. A. MORGAN,
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The Daily Record Co. Print. Baltimore.

SUBJECT INDEX

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OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland is reported in 48 Fed. Supp. 88. The opinion of the Circuit Court of Appeals for the Fourth Circuit is reported in 138 Fed. (2d) 111.

JURISDICTION

The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code (U. S. Code, Title 28, Sec.

347). Judgment of the Circuit Court of Appeals was entered on September 16, 1943. The petition for the writ of certiorari was filed December 16, 1943.

STATEMENT OF THE CASE

The petitioners sued respondent under the Fair Labor Standards Act (29 U. S. C. A. 201-219) to recover alleged unpaid over-time compensation accounting from October 25, 1938, the date this Act became effective, up to January 19, 1942, at which latter date their business relations with the respondent were terminated. Subsequent thereto when they entered suit under the Act they necessarily claimed (1) that they had been employees and (2) as such employees were engaged in interstate commerce, and (3) that from October 25, 1938 to January 19, 1942 they were not paid in accordance with the provisions of this Act. These claims were denied by the respondent in its answer and on the evidence produced the District Court, sitting as a jury, held (48 Fed. Supp. 88):

(1) the plaintiffs were not employees of the defendant within the scope and meaning and operation of this Act;

(2) the plaintiffs were not employed in interstate commerce or in the production of goods for commerce within the meaning of the Act, and

(3) the complaint should be dismissed.

ISSUES PRESENTED

There are, therefore, two questions at issue, namely:

1. Were the Petitioners employees of Respondent within the meaning of the Fair Labor Standards Act?

2. Were the Petitioners engaged in Interstate Commerce within the meaning of the Act?

If either of these issues is answered in the negative, then the Petitioners' case must fail and the petition should be denied.

ARGUMENT

1. The Petitioners Were Not Employees of Respondent Within the Meaning of the Act.

Such was the finding of the District Court. However, the Circuit Court of Appeals held (138 Fed. (2d) 111):

> "The facts bearing on the issue as to whether or not the plaintiffs were employees of defendant are voluminous and complicated and are fully and fairly stated in the opinion below. Whether upon these facts plaintiffs were employees of defendant within the meaning of the act, is a question not free from difficulty (*Cf. Southern R. Co. v. Black*, 4 Cir., 127 F. 2d 280), but it is one which it is not necessary for us to decide, since we are of opinion that, even if considered employees of defendant, plaintiffs were not engaged in commerce within the meaning of the act."

The Finding That Petitioners Were Not Employees Is Supported By Substantial Evidence.

Upon the weight of the testimony the Trial Judge found that the petitioners were not employees of the respondent. There was sufficient and substantial evidence to support this finding, as an examination of the transcript and of the District Court's findings of fact will demonstrate. A few of the pertinent facts as shown in the Transcript, justifying the ultimate finding that the petitioners were not employees, are as follows:

1. "The Schroepfers were known in the business as rackmen. Their relations with the defendant * * * existed for several years prior to October 24, 1938, when the Fair Labor Standards Act became effective. Each had a separate territory for the distribution and sale of newspapers. Their activities consisted in the delivery of the several successive editions of the daily newspapers to the street-corner vending machines and of the Sunday papers to some stores in their respective territories. The vending machines were in the general form of metal racks placed on various street-corners, holding a number of copies of papers, with a receptacle under lock and key for the deposit of coins to be made by the purchasers of the papers. The rack-men, of whom there were about fourteen for Baltimore City, collected the money daily from the vending machines. They were entitled to retain or be credited with the whole of the money so collected." (Petitioners admit the foregoing to be true. See their brief in C. C. A. at pp. 3-4.)

2. The rack-men purchased the papers at wholesale rates and sold them at retail rates, keeping the difference for themselves. (Tr. 28.)

3. The racks or vending machines were owned by the Company but rented to the rack-men, who paid a weekly rack rental. The rack-men were not paid a salary as such but were given a car allowance on account of expenses for their operation thereof. (Tr. 63, 218, 300, 161-164, 183, 185, 217-221.)

4. The respondent did not interfere with or control in any way the activities of the petitioners in the distribution of papers to the vending machines. (Tr. 186, 306, 312.)

5. The rack-men directly employed and paid such helper or helpers as they needed or required for their activities without the knowledge or previ-

ous authority of the respondent. They could take for resale more or less papers for each edition provided their territory was properly serviced. (Tr. 74, 101, 265, 311.)

6. The respondent did not treat the petitioners as employees. It carried group insurance for its employees but the petitioners were not included. They were not carried on any of the books or records of the Company as employees or credited thereon with any salary or services. The respondent's employees were given annual vacations with pay but this did not include the rack-men. (Tr. 111, 176, 285.)

7. The petitioners were not required to give the operation their personal attention, but could and did themselves appoint substitutes, whenever they saw fit to do so, to handle their affairs. (Tr. 101, 132, 177.)

8. There was no means available to the respondent whereby it could control the number of hours of work performed by the rack-men and they alone determined how much time they would spend themselves or through a substitute or helper. (Tr. 132, 137, 175, 186, 276.)

It was contended by respondent below, as it is now, that under Rule 52(a) of the Federal Rules of Civil Procedure, providing that "findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opinion of the Trial Court to judge the credibility of the witnesses," the burden rested upon the petitioners to prove that the findings by the District Court, sitting as a jury, were clearly erroneous. The petitioners have not met this burden and the Circuit Court of Appeals refused to set aside the District Court's findings of fact. The petitioners now seek to have this

Court review the evidence upon which the District Court made its findings and to decide disputed questions of fact, which, we submit, was the proper function of the trial Court only.

2. The Petitioners Were Not Employed In Interstate Commerce.

In affirming the District Court on this finding the Circuit Court did so, as its opinion shows, in conformity with previous decisions of this Honorable Court.

The petitioners state, as the principal reason for the granting of the writ, that the decision of the Circuit Court of Appeals in the instant case is probably in conflict with the applicable decisions of this Honorable Court and they cite, in support of this allegation, the cases of *Overstreet v. North Shore Corporation*, 318 U. S. 125, and *Walling v. Jacksonville Paper Company*, 317 U. S. 564.

In the *Overstreet case*, the employees in question were respectively engaged (1) in raising a draw bridge for the passage of boats engaged in interstate commerce and lowering it for the resumption of traffic over an interstate arterial highway, (2) in maintenance and repair work on the road and bridge and (3) in selling and collecting toll tickets from "vehicles using said road in interstate commerce."

Obviously the facts in the *Overstreet Case, supra*, are not analogous to the facts in the instant case. Nor are the facts in the *Pedersen case*, 318 U. S. 740, also cited by petitioners, analogous here.

In the *Jacksonville Paper Company* case the Court held that:

(1) the Act *was applicable* to employees at branch warehouses of wholesale distributor of paper products receiving major portion of its products from out of state where substantial part of activities relate to shipments, on special prior orders of customers, which stop at warehouses only for checking, or to deliveries of goods obtained by wholesaler pursuant to understanding with customer to meet its needs.

(2) the Act was *not applicable* to employees where substantial part of activities relate to filling orders from warehouse when there is no prior contract, order or understanding.

(3) All phases of wholesale business selling intrastate are not covered by Act solely because purchases are made interstate.

It is of importance to note what this Court said in *McLeod vs. Threlkeld*, — U. S. —, 63 S. Ct. 1248:

> "Our question is whether he was 'engaged in commerce'. We have held that this clause covered every employee in the 'channels of interstate commerce', Walling v. Jacksonville Paper Co., No. 336, October Term 1942 (6 WHR 81), as distinguished from those who merely affected that commerce. So handlers of goods for a wholesaler who moves them interstate on order or to meet the needs of specified customers are in commerce, while those employees who handle goods after acquisition by a merchant for general local disposition are not."

The newspapers made available to the rack men, who purchased the same for resale at the racks or vending machines at the street corners, were for local disposition to whomsoever might purchase them and without a prior order from anybody. This fact is beyond any dispute.

Therefore, even if the newspapers in this case were imported in final form from another state, as goods were in the *Jacksonville* case and the case of *Higgins vs. Carr Bros., infra*, the handling thereof by the rack men for mere local distribution and not pursuant to a previously given order, would not constitute interstate, but merely an intrastate, activity.

Moreover, it is to be noted in the *Jacksonville* case that there is no change, or processing of, the goods in question, that the goods merely came temporarily to rest for the purpose of checking and then continued their journey on to those who have ordered them.

In the instant case, the Respondent receives its newsprint, its ink, its special features and a very large part of its news items from out the State. It then takes all of these items, together with others, and makes or manufactures a newspaper. A comparatively small percentage of the manufactured article, namely the newspaper, is distributed outside the State. Over ninety per cent. of the newspaper is distributed in this State and of the amount so distributed, a relatively small part was sold to the petitioners and other rackmen who in turn re-sold it to the public in Baltimore City.

The difference between this case and the *Overstreet* and *Jacksonville Paper Company* cases is, therefore, obvious. The same distinction is equally obvious between the instant case and *Western Union Telegraph Company v. Foster*, 247 U. S. 105, in that in that case there were predetermined or existing customers, namely brokers, and the Western Union Company was merely a conduit which passed on to these customers the quotations furnished to it.

The instant case is much more similar to the case of *Higgins v. Carr Bros, Co.*, 317 U. S. 572, not cited by the petitioners, wherein a wholesaler of fruit, groceries and produce in Portland, Maine, bought its merchandise from local producers and from dealers in other states, had it delivered by truck and rail, unloaded it into its store and warehouse and from there sold and distributed it to the retail trade in the State of Maine only. Some of the produce was processed and much of it was sold in the condition in which it was received. The wholesaler owned all of its merchandise, made its own deliveries and made no sales on commission nor on order with shipments direct from the dealer or producer to the retail purchaser. The employee in question worked as a night shipper in putting up orders and loading trucks for delivery to the retail trade in Maine or driving a truck distributing the merchandise to the local trade. The Court said that there was nothing to impeach the accuracy of the conclusion of the Supreme Judicial Court of Maine that when the merchandise coming from without the State was unloaded at Respondent's place of business its "interstate movement had ended."

So here where the various elements, including items of news, arrived at the newspaper company's office and were made into a newspaper the interstate character of these elements came to an end and one engaged in the delivery in local trade of the processed article was not engaged in interstate commerce within the meaning of the Fair Labor Standards Act.

We think it pertinent at this point to quote from Judge Chesnut's findings as follows:

> "The evidence shows that they had no part, however small, in the manufacture or production of the

> defendant's newspaper, either physically or by a necessary relation. Nor did they touch in any way the distribution of newspapers outside of Baltimore City and its immediate environs."
>
> "There could hardly be a more purely intrastate activity than the sale of newspapers in a particular small part of a large city, especially where the newspaper is locally produced in the same city."

It appears from the petition (p. 3) and supporting brief (p. 19, etc.) that petitioners' argument on the commerce question amounts to this: Since the respondent was admittedly engaged in interstate commerce and in the production of goods for commerce, therefore the petitioners must have been engaged likewise.

However, such is not the law. In *Overstreet v. North Shore Corp.*, 318 U. S. 125, one of the two cases relied upon principally by the petitioners, it was stated by this Court:

> "The nature of the employer's business is not determinative, because as we have repeatedly said, the application of the Act depends upon the character of the employees' activities."

The petitioners also cite *Hearst Publication, et al. v. National Labor Relations Board*, 136 Fed. (2d) 608 (9 C. C. A.) now pending in this Court. This case is entirely inapplicable to the instant case in that there the Court was construing the National Labor Relations Act, whereas in the instant case the Fair Labor Standards Act is involved and this Court has repeatedly pointed out the difference in scope and coverage between the two Acts. Furthermore, the petitioners' interpretation of the quotation from that case on page 22 of its supporting brief, is misleading as appears from the very next sentence of the opinion of the Ninth Circuit, as follows:

> "It seems likewise clear that a disturbance in the street sales distribution of any one of these metropolitan dailies would materially *affect* the whole business and a fortiori would *affect* the free flow of interstate commerce. (Italics supplied).

An examination of the petitioners' argument on the commerce question shows that they rely heavily upon the contention, as stated in their brief at page 21, that "it is unquestionably true that if the distribution of the paper was suddenly stopped, the very life of respondent's business would be jeopardized, etc." The facts in this record are to the contrary, as evidenced by the findings of Judge Chesnut, viz:

> "The factual contention that the Schroepfers were performing a part of the newspaper enterprise essential to the whole is seemingly clearly refuted by the fact in this case that the defendant terminated the whole system of sales by rack-men through vending machines, rather than yield to a ruling recommended by the Local Director to the Administrator of the Act. The evidence does not show what, if any, substitute has been adopted by the defendant to replace sales of papers through vending machines, but there is no suggestion that the abandonment of the vending machines has impaired the success of the newspaper enterprise."

3. No Important Federal Question Is Involved.

As to petitioners' other contention, namely, that a writ should be granted because an important question of Federal law is involved, petitioners have wholly failed to show that the so-called rack or vending machine system was ever anything but a system applicable to Baltimore City; and as a matter of undisputed fact, it appears (Tr. 166-168) that the Respondent installed the system only

in 1930 and abandoned it in January 1942, as pointed out above. There has also been no showing by the petitioners that there were any other persons engaged elsewhere who were likely to be affected by the decision in this case. In consequence a decision in this case is of very limited local importance.

CONCLUSION

We submit that the petitioners have totally failed to show that the Circuit Court of Appeals decided "a Federal question in a way probably in conflict with applicable decisions of this Court". To the contrary, it appears that the decision of the Circuit Court was in conformity with and supported by decisions of this Court.

And, with respect to their contentions as to being employees of respondent it is clear that they would have this Court review the findings of the District Court, sitting as a jury, upon conflicting testimony offered by the respective parties. In this attempt they fail to meet the burden cast upon them under Rule 52A of the Federal Rules of Court Procedure.

The petition should, therefore, be denied.

Respectfully submitted,

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WILLIAM D. MACMILLAN,
Counsel for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1943.

No. 545.

FRED SCHROEPFER, CHARLES R. SCHROEPFER AND ABRAHAM BERRY,

Petitioners,

vs.

THE A. S. ABELL COMPANY, INC.,

Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING AND PETITION FOR REHEARING ON DENIAL OF WRIT OF CERTIORARI

I. DUKE AVNET,
WM. TAFT FELDMAN,
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The petitioners, Fred Schroepfer, Charles R. Schroepfer and Abraham Berry, respectfully move this Honorable Court for leave to file a petition for rehearing and respectfully show:

1. On December 16, 1943, petitioners filed in this Court a petition for writ of certiorari to review a judgment of the United States for the Fourth Circuit, and certiorari was denied on January 17, 1944.

2. Thereafter, on April 24, 1944, this Court decided the cases of National Labor Relations Board v. Hearst Publications, et al. (Nos. 336-339, Oct. Term, 1943), involving an employment relation substantially identical with that of petitioners in this case. Petitioners believe that although the statute involved in Nos. 336-339 is the National Labor Relations Act, whereas the present suit involves the proper interpretation of the Fair Labor Standards Act of 1938, the rights in issue and the nature of the employment relation are such that this Honorable Court should reconsider its action denying certiorari and should entertain at this time a petition for rehearing.

R. Simpson & Co., Inc., v. Commissioner of Internal Revenue, — U. S. — (No. 1, Oct. Term, 1943, decided Feb. 14, 1944) and cases cited.

STATEMENT OF THE MATTER INVOLVED

This case involves an important question of coverage under the Fair Labor Standards Act of 1938, 29 U. S. C., Secs. 201 ff., and particularly as it applies to those employees of a large metropolitan newspaper who are engaged in the local distribution of its papers. Respondent is the publisher of the Baltimore Sunpapers. The facts as to respondent's interstate business briefly summarized are these: respondent receives news flashes from all over the world as well as numerous syndicated columns and other national features, advertising is solicited outside the state, raw materials used in the publication of the newspapers are derived principally from outside the state, parts of the paper (such as the Sunday rotogravure section and the magazine section) are received from without the State already printed and ready for circulation, and about 7% of its distribution is outside of the State of Maryland. Its

local distribution of papers during the period involved in this proceeding was carried through three main channels: carrier delivery; sale through news stands and newspaper counters in stores, hotels, depots, etc.; and sale through "racks" or street corner receptacles in which the papers were placed and subsequently removed by the purchaser who paid for them by leaving his pennies in the attached coin box. In the latter two methods of distribution respondent made use of the so-called "rackmen" whose duties included delivering papers to the stores and to the racks. In the discharge of these duties each rackman needed a helper who was selected by the rackman and received his compensation directly from him. Respondent knew that in the service of the racks the rackmen needed and had helpers.

The rackmen were employees, as shown by the following facts, which were fully supported by the record: The rackmen were limited in the route where their work was done and the respondent reserved the right to, and did on occasion, take away busy racks from their routes and gave the "points" to newsboys; the rackmen were permitted to distribute respondent's papers only and were not allowed to assign or sell their routes; the sales price of the papers was fixed by the respondent; their hours of work were determined by the respondent in regulating the time of its various editions, as the men were expected to be on hand when the papers came off the presses and they had to punch a time clock when reporting in the morning; the number of papers allotted to the men was in the control of the respondent; their returns were limited by the Circulation Department; they were supervised in the manner of servicing the racks and were required to attend meetings at which they were asked by the Circulation Manager what "they were doing and thinking about" and were given "pep

talks" on the value of advertising; they were compelled to put up advertising cards in the racks, even those promoting cheaper carrier service to their own detriment; they were required at their expense to insure respondent against liability due to the negligent operation of their automobile; they were compelled to make minor repairs to racks; they were threatened with discharge for breaches of discipline; they had to distribute Sunday papers for a fixed compensation estimated to cover little more than the cost of operation of their automobiles; they were required to solicit all stores in their routes, although it was uncontradicted that the compensation allowed for such "sales" was inadequate; in 1941 additional editions were put out and the men were required to make additional trips without extra compensation; the respondent exercised further control over the earnings of the men by varying the rack rental in its arbitrary discretion. And if respondent's own testimony is to be accepted, the amount allowed the men for car expense was also fixed by respondent. Furthermore, the respondent, through certain of its high-ranking officials described the petitioners as employees in a book written by them under the title "The Sunpapers of Baltimore".

Petitioners Fred Schroepfer and Charles R. Schroepfer were rackmen and in this proceeding they sought recovery of unpaid overtime compensation; and petitioner Abraham Berry acted as a rackman's helper to the Schroepfers and he sought recovery of both unpaid minimum wages and overtime compensation.

The District Court of the United States for the District of Maryland, sitting as a jury, decided that petitioners, Fred and Charles Schroepfer, were not employees of the respondent but were independent contractors. It also held

that petitioner Berry in his work as helper was not an employee of the respondent but was the employee of the other petitioners. Finally, the District Court held that although the respondent was admittedly engaged in interstate commerce and in the production of goods for commerce within the meaning of the Fair Labor Standards Act, the petitioners were not engaged in interstate commerce.

The Circuit Court of Appeals for the Fourth Circuit affirmed the lower Court on the sole ground that the petitioners were not engaged in commerce within the meaning of the Act. The Circuit Court of Appeals made no finding on the question of whether petitioners were employees of respondent.

If, as petitioners contend, their work was in interstate commerce then the question of whether they were employees under the Fair Labor Standards Act will also have to be determined by this Court.

THIS COURT HAS JURISDICTION

This Court has jurisdiction under Sec. 240 (a) of the Judicial Code (U. S. Code, Title 28, Sec. 347). The Circuit Court of Appeals decided this case on September 16, 1943, and its mandate issued on October 18, 1943.

THE QUESTIONS PRESENTED

1. Were the rackmen and their helpers who distributed newspapers of the respondent to stores and racks in Baltimore City engaged in interstate commerce within the meaning of the Fair Labor Standards Act?

2. Were the petitioners employees of respondent within the meaning of the Act?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

In the present case the Circuit Court of Appeals decided "a federal question in a way probably in conflict with applicable decisions of this Court" (Supreme Court Rule 38 (5) (b)). Two guides to decision exist in the precedents of this Court. In *Overstreet v. North Shore Corporation*, 318 U. S. 125, the test laid down is whether the work of the employees "is so intimately related to interstate commerce 'as to be in practice and in legal contemplation a part of it' * * * and justifies regarding petitioners as 'engaged in commerce' within the meaning of the Fair Labor Standards Act." In *Walling v. Jacksonville Paper Company*, 317 U. S. 564, the test to determine whether an employee, engaged in local distribution of goods imported from without the State by a wholesaler, is within the coverage of the Act, depends upon a finding that "there is a practical continuity of movement of the goods until they reach the customers for whom they are intended."

If a realistic appraisal of respondent's business and petitioners' relation to it is made, petitioners' activity satisfies the tests set up in both the *Overstreet* and *Jacksonville* cases.

The movement of intelligence or information across state lines is interstate commerce, and has been frequently so held in decisions of this Court. Petitioners' work was an integral part of the interstate gathering and distribution of news in which respondent is engaged, for the process which begins with the collection of news, admittedly an interstate activity, is continuous and does not end until the paper is placed in the hands of the customer or reader.

Respondent's business must be conceived in large as the gathering and editing of news, soliciting of advertising,

assembling and printing, and distributing. It is the sum of these activities that constitutes the interstate business of respondent. Petitioners' work of distribution was a link in the transmission of the news from world-wide sources to the ultimate reader. It is unquestionably true that if the distribution of the paper were suddenly stopped, the very life of respondent's business would be jeopardized, and this would mean the virtual destruction of the news-gathering, advertising-soliciting, supplying of raw materials, and all the other operations of respondent transcending state boundaries. It is clear, therefore, that petitioners' work is "in commerce" within the broad definition laid down by this Court.

That the commerce in the present case is largely unidirectional is of no significance. Moreover, if commerce exists and the employment of a particular employee plays an important role in the traffic, he is engaged in commerce even though his own work does not transcend state boundaries. Distribution of the completed newspaper, being the ultimate step in the publishing process, is an activity in interstate commerce.

If the distribution of the papers is seen in its true perspective as the final step in the unitary news-gathering-assembling-editing-and-distributing process, petitioners' activity cannot be sheared off from the work of the rest of respondent's employees and considered purely local in character. To sever this stage arbitrarily from what precedes it would be to disregard entirely the primary function of a modern newspaper, which is to bring news from the "four corners" of the earth to the reader.

In the *Jacksonville* case the Court stated that if extra-state goods had a specific local destination, the goods enjoyed a *practical* continuity in transit so as to render their

distribution from a local warehouse an activity in interstate commerce. In the instant case, the matter of handling the news demonstrates that there was *actual* continuity in transit; the transmission was "as continuous and rapid as science can make it." (*Western Union Telegraph Co. v. Foster,* 247 U. S. at 113.) But the facts of this case also indicate that there was a "practical continuity" in the sense that that phrase was used in the *Jacksonville* case. The intelligence or information when it began its interstate journey was not destined to stop at the newspaper plant, but instead was intended to move immediately to the racks, and to the stores and other places which had standing orders or their equivalent with respondent.

Petitioners were fully as much a part of that movement as were employees receiving news off the wires. Petitioners were therefore engaged in commerce within the meaning of the Act.

With regard to the issues of whether the employer-employee relationship existed in this case "an important question of federal law which has not been but should be settled by this Court" (Supreme Court Rule 38 (5) (b)), is presented. For this question involves the proper interpretation to be given the statutory language contained in Sec. 3 (g) of the Fair Labor Standards Act "that 'employ' includes to suffer or permit to work"; and in the absence of a final ruling by this Court, the Congressional intent cannot be definitely ascertained. Moreover, if this critical language of the statute is restricted to cover only those who are employees at common law, as held in the opinion of the District Court, the benefits of the Act will be withdrawn from large groups of workmen to whom Congress undoubtedly intended such benefits to apply.

The failure of the Circuit Court of Appeals to pass upon this question should not interfere with its consideration

by this Court. We believe that this Court has already shown that it regards the definition of the employer-employee relationship under social legislation of prime importance.

In *National Labor Relations Board v. Hearst Publications et al.*, this Court upheld a finding of the Board that the "newsboys" were employees, even though the elements of control were less clearly defined than here.

It is noteworthy that the language employed in the definition of the employment relation is more restricted in the National Labor Relations Act than in the Fair Labor Standards Act, and it would seem to be at least equally important that the scope of the coverage under the latter Act, as under the former one, should be settled by this Court.

Respectfully submitted,

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